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Omaha World-Herald *and* Teamsters District Council 2, Local 543M, affiliated with International Brotherhood of Teamsters. Case 17–CA–24389

December 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

The question presented in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by implementing changes to benefit plans without giving the Union an opportunity to bargain.[1] Specifically, on January 1, 2009, the Respondent froze the accrual of benefits in its pension plan and, on April 1, 2009, ceased matching contributions to employee 401(k) plan accounts. The judge rejected the Respondent's argument that the Union waived its right to bargain over these changes, finding that, in both instances, the Respondent violated the Act as alleged.

As discussed below, a majority of the Board (Members Becker and Hayes) reverses the judge's determination that the Respondent's change to its pension plan violated Section 8(a)(5) and (1), finding that, under all the circumstances of this case, the Union waived its right to bargain over those changes during the term of the contract. A different majority (Chairman Pearce and Member Becker), adopts the judge's conclusion that the Union did not waive its right to bargain over the change to the 401(k) plan. Consistent with extant Board precedent, they find that the Respondent was not privileged to make this change because it occurred after the parties' contract and attendant waivers had expired.

I. THE PENSION PLAN CHANGE[2]

Contrary to the judge, we conclude that the Respondent has established that the Union clearly and unmistakably waived its right to bargain during the term of the contract over changes to the employee pension plan. In so concluding, we rely on an amalgam of factors that support a finding of waiver even though none of the factors, standing alone, is sufficient to establish waiver under existing precedent cited by the General Counsel.[3]

First is the collective-bargaining agreement language addressing the pension plan.[4] Article 28 of that agreement provides:

> The Company acknowledges that bargaining unit employees are eligible to participate in the retirement plan, group hospital, loss of time and life insurance programs provided the requirements for participation are met. The Company will advise the Union of proposed changes and meet to discuss and explain changes if re-

[1] On March 26, 2010, Administrative Law Judge James M. Kennedy issued the attached decision and, on April 7, 2010, he issued an erratum. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order. We have amended the remedy and conclusions of law, and have modified the judge's recommended Order to conform to our findings. We shall also substitute a new notice to conform to the Order as modified.

In his recommended Order, the judge included broad language requiring the Respondent to cease and desist from violating the Act "in any other manner." We have modified the Order to include the narrow injunctive language "in any like or related manner," consistent with the judge's recommended notice to employees, as we find that a broad order is not warranted under the circumstances of this case. See *Hickmott Foods*, 242 NLRB 1357 (1979).

We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

Some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

The Respondent has requested oral argument. This request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] Members Becker and Hayes join in this part of the opinion except where noted.

[3] Because this combination of factors plainly establishes waiver, Member Hayes finds it unnecessary to decide whether, singly, any of the factors would do so. He also finds that the Respondent was privileged to make the change under either the Board's "clear and unmistakable" waiver standard or the "contract coverage" analysis applied by the U.S. Courts of Appeals for the D.C. and Seventh Circuits. See *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); *Department of the Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992); *NLRB v. U.S. Postal Serv.*, 8 F.3d 832 (D.C. Cir. 1993). Accordingly, he finds it unnecessary to decide at this time whether to adopt the "contract coverage" analysis instead of the "clear and unmistakable" waiver standard. Member Hayes further observes that the Board has recognized that an employer's unilateral change does not violate Sec. 8(a)(5) where, as here, it is made pursuant to a "well-established past practice" accepted by a union. See, e.g., *Courier-Journal*, 342 NLRB 1093, 1094 (2004). Because he agrees with Member Becker that waiver is established even without considering evidence of past practice, he does not reach the issue of the weight such evidence should be accorded in determining whether bargaining was required in the instant case.

[4] When the Respondent made the January 2009 change to the pension plan, the parties' collective-bargaining agreement remained in effect. The agreement expired on February 5, 2009. At the time of the hearing, in July 2009, the parties had not reached a successor agreement nor had they agreed to extend the expired agreement.

> quested. Inasmuch as the plans cover all employees, not just bargaining unit employees, changes in these plans are not subject to Article Five of the Agreement [the grievance and arbitration clause]. Employees may retire at age 65.

All parties concede that the agreement's reference to "the retirement plan" is to the Employer's unilaterally created pension plan. That pension plan is not described in the agreement and thus the reference can only be understood by examining the plan's prior operation and the governing plan documents. Although not directly quoted in the judge's decision, the plan documents include reservation of rights language, which expressly provides that the "Employer shall have the right at any time to amend the Plan," including "determin[ing] all questions relating to the eligibility of Employees to participate or remain a Participant hereunder and to receive benefits under the Plan." The Board previously has held that similar contractual language–i.e., language providing that unit employees would participate in the company's benefits programs on the same basis as all other employees–was too ambiguous, standing alone, to demonstrate a union's assent to an employer's right to make unilateral, company-wide changes to benefits plans affecting represented employees, even when the plan documents contained a similar reservation of rights clause.[5] Here, however, the contractual reference to an existing plan, the governing documents of which contain a reservation-of-rights clause, is not the only evidence of waiver.

The second factor contributing to our finding of a waiver is the existence of language in the collective-bargaining agreement expressly excluding changes to the retirement plan (and other company-wide, unilaterally established plans) from the parties' grievance and arbitration procedure. Although the Board has held that the mere exclusion of a subject from a contractual grievance/arbitration system does not constitute a clear and unmistakable waiver of a union's right to bargain concerning the subject,[6] the contract here goes further and explains that changes to the benefit plans are excluded from the grievance and arbitration procedure *because* the plans cover all employees, not simply represented ones. This explanation suggests that the Respondent was attempting to preserve its authority to make uniform changes in the plans as they applied to both represented and unrepresented employees.

Third, the collective-bargaining agreement states that the Respondent "will advise the Union of proposed changes [to the pension plan] and meet to discuss and explain changes if requested." The judge found that this clause alone was insufficient to constitute a clear and unmistakable waiver. In combination with the language discussed above, however, the clause supports such a finding. It is surely significant that the parties chose the terms "discuss" and "explain" rather than "bargain over." Indeed, had the parties intended to convey a bargaining obligation with respect to changes to the pension plan, they likely would have used the term "bargain," as they did elsewhere in the agreement.[7] For that matter, if the Union had not agreed to waive its statutory right to bargain about changes to the plan, there was no need to include any language about a lesser contractual right.

In our view, the foregoing factors establish waiver in this case and set it apart from other Board decisions in which no clear and unmistakable waiver was found. The contract, including article 28, was in effect when the change to the pension plan occurred (in contrast to the change to the 401(k) plan, discussed below). The parties agreed that employees would be covered by a unilaterally established pension plan covering all the Respondent's employees, both unit and nonunit. The agreement did not describe the pension plan, which could only be understood by reference to the plan documents and existing practice. The plan documents contained express reservation of rights language permitting the Respondent to unilaterally change the plan. The parties agreed that changes in the plan were excluded from the contractual grievance/arbitration system. The parties agreed to that exclusion on the express ground that the plan covered unit and nonunit employees. Finally, the parties agreed that the Respondent would advise the Union and, upon request, "meet and discuss" changes to the plan, rather than bargain over them. In combination, we conclude that these facts demonstrate that the Union clearly and unmistakably waived its right to bargain about changes to the pension plan during the contract's term. See *Co-*

[5] See, e.g., *Rockford Manor Care Facility*, 279 NLRB 1170, 1172–1173 (1986) (no waiver where agreement provided that unit employees "will participate in the [c]ompany's [benefits] programs on the same basis as other employee members of the group."); *Trojan Yacht*, 319 NLRB 741, 742–743 fn. 5 (1995) (no waiver where agreement provided that benefits "will be maintained in the same manner and to the same extent such plans are generally made available and administered on a corporate basis").

[6] See, e.g., *Bonnell/Tredegar Industries*, 313 NLRB 789, 791 (1994), enfd. 46 F.3d 339 (4th Cir. 1995) (parties' "exclusion of certain benefit provisions from the grievance-arbitration procedure is open to any number of possible inferences, including the likelihood that the parties simply preferred to resolve disputes over these subjects in other forums.").

[7] For example, art. Four ("Jurisdiction") of the parties' agreement provides, inter alia: "The company recognizes the Union as the sole and exclusive collective bargaining agent for the purpose of collective bargaining concerning wages, hours and other conditions of employment for employees covered by this agreement."

lumbus Electric Co., 270 NLRB 686, 686 (1984), enfd. sub nom. *Electrical Workers IBEW Local 1466 v. NLRB*, 795 F.2d 150 (D.C. Cir. 1986) (clear and unmistakable evidence of the parties' intent to waive a duty to bargain "is gleaned from an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement.").

Corroborating our finding of waiver is the fact that the Union did not object to a similar, prior unilateral change by the Respondent during the term of the contract. Specifically, in 2005, the Respondent modified its pension plan by removing all employees under age 50 from the plan. The Union neither objected to the change nor requested bargaining. The Board has previously held that a union's acquiescence in an employer's prior unilateral changes, without more, generally does not constitute a waiver of the right to bargain over such changes for all time.[8] However, this prior uncontested unilateral change does suggest that past practice under article 28 has been consistent with a waiver of the right to bargain over modifications to the pension plan.

Our dissenting colleague finds the evidence cited above insufficient to establish a waiver under the clear and unmistakable standard. He observes that the Board previously has found the factors we rely upon insufficient, individually, to prove waiver, and contends they are wanting in combination as well. The dissent contends that, in finding otherwise, our decision "dilutes or abandons" the Board's established waiver standard. We respectfully disagree.

Plainly, the language of article 28 cited above, the reservation of rights clause in the plan documents, and the parties' past practice all are relevant to the question of whether the record supports a finding of waiver. We have appropriately, and consistent with extant precedent, considered the cumulative weight of this evidence. *Columbus Electric Co.*, supra. No prior decisions have involved the unique combination of factors that exists in this case.[9] Accordingly, we have neither diluted nor abandoned the clear and unmistakable waiver standard, but have instead applied it to the totality of the circumstances presented.

II. THE 401(K) PLAN CHANGE[10]

After the expiration of the parties' collective-bargaining agreement, the Respondent unilaterally implemented the change to its 401(k) plan described above. In finding that this change violated Section 8(a)(5) and (1), the judge rejected the Respondent's argument that the Union waived its right to bargain about this change. In its exceptions, the Respondent continues to assert this waiver argument, relying on the above cited contractual provisions, additional contractual provisions relating solely to the 401(k) plan,[11] and 401(k) plan documents.[12] We need not address whether these facts would be sufficient to establish waiver if the agreement remained in force at the time of the unilateral change. Under well-settled Board law, "the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intentions to the contrary." *Ironton Publications*, 321 NLRB 1048, 1048 (1996). This principle applies both to collective-bargaining agreements and to reservation of rights language embodied in outside plan documents incorporated by reference. See *E. I. du Pont De Nemours, Louisville Works*, 355 NLRB No. 176, slip op. at 2 (2010). Because there is no evidence that the parties intended any relevant provision of the agreement to continue in force beyond its expiration, any waiver that might be shown by the contract language or plan documents cited by the Respondent ended when the contract expired. See *Paul Mueller Co.*, 332 NLRB 312, 313 (2000).[13]

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[8] See, e.g., *Register-Guard*, 339 NLRB 353, 356 (2003); *Johnson-Bateman Co.*, 295 NLRB 180, 188 (1989). Moreover, the Board has previously held that a union's acquiescence in prior unilateral changes–even together with reservation of rights language similar to that in the instant case–was insufficient to establish a waiver. See, e.g., *Southern Nuclear Operating Co.*, 348 NLRB 1344, 1352 (2006), enfd. in part, vacated in part 524 F.3d 1350 (D.C. Cir. 2008); *Amoco Chemical Co.*, 328 NLRB 1220, 1222 fn. 6 (1999), enf. denied 217 F.3d 869 (D.C. Cir. 2000). These decisions are not inconsistent with our conclusion here, however, as our finding of a waiver rests upon a combination of other factors.

[9] See, e.g., *Amoco,* supra (reservation of rights provision did not establish waiver where simply mentioned in collective-bargaining agreements as general source of information about plans; unlike this case there were no terms obligating employer to "discuss and explain changes" or explaining that disputes over the plan were excluded from grievance arbitration); *Southern Nuclear,* supra at 1356 (reservation of rights provision did not establish waiver where collective-bargaining agreements did not even mention plan at issue; recognizing, however, that language stating employer "shall provide a comprehensive group major medical insurance program-covering employees who comply with the eligibility and qualification requirements" "appears to constitute a waiver" with respect to that plan).

[10] Chairman Pearce and Member Becker join in this part of the opinion.

[11] Section 28 of the parties' agreement provides that "[t]he Company agrees that if the Omaha World-Herald Newspaper board of directors approves the implementation of a 401(k) plan for its employees, bargaining unit employees will be eligible to participate in such a plan the same as all other employees based on the provisions of the plan adopted."

[12] Art. II ("Contributions") of the 401(k) Summary Plan Description provides that the Respondent has the discretion to determine, if any, the percentage of matching contributions.

[13] We also reject, for the reasons stated by the judge, the Respondent's argument that the parties' past practice privileged its April 2009 unilateral change to the 401(k) plan.

In arguing that this change should be found lawful, our dissenting colleague concedes that well-established precedent dictates otherwise. In the dissent's view, the reservation of rights language here, standing alone, authorized unilateral action on the Respondent's part both during the contract term and indefinitely thereafter. However, as the Board recently reiterated in *E.I. DuPont*, a reservation of rights clause is not, in itself, a term or condition of employment that continues in force under Section 8(a)(5) as part of the status quo. See 355 NLRB No. 176 at 3 fn. 9 (citing *Holiday Inn of Victorville*, 284 NLRB 916, 916 (1987)). Rather, when incorporated by reference in a collective-bargaining agreement,[14] a reservation of rights clause is a waiver of a union's statutory right to bargain over such matters and, thus, like any waiver, expires with the contract absent evidence of a clear and unmistakable intent to the contrary. *Holiday Inn*, 284 NLRB at 916. No evidence exists in this case to suggest that the parties intended the reservation of rights language in the 401(k) plan documents to continue post-contract expiration.

For all the foregoing reasons, we adhere to Board precedent and adopt the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by making its April 2009 change to the 401(k) plan.

AMENDED CONCLUSIONS OF LAW

Delete the judge's Conclusion of Law 4 and renumber the remaining paragraph.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent, upon request of the Union, to bargain with the Union, as the exclusive collective-bargaining representative of the unit, with respect to matching contributions to employees' 401(k) plan accounts. We shall also order the Respondent to rescind the unlawful change in the 401(k) plan that it made on April 1, 2009, restore the 401(k) plan that existed before the unlawful change, and make unit employees whole for any losses they suffered as a result of the unlawful change in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

ORDER

The National Labor Relations Board orders that the Respondent, Omaha World-Herald, Omaha, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Teamsters District Council 2, Local 543M, affiliated with the International Brotherhood of Teamsters, as the exclusive collective-bargaining representative in the following unit by unilaterally ceasing matching contributions to unit employees' 401(k) plan accounts. The unit is:

> All regular full-time and regular part-time journeyman pressmen and apprentice pressman, including leadmen, employed by the Employer at its facility in Omaha, Nebraska, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the unit with respect to matching contributions to employees' 401(k) plan accounts until agreement or good-faith impasse is reached, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Rescind the unilateral change made to unit employees' 401(k) plan on April 1, 2009, restore the 401(k) plan that existed before the unlawful change, and make unit employees whole for any losses suffered as a result of the unlawful change, in the manner set forth in the amended remedy section of this decision.

(c) Within 14 days after service by the Region, post at its Omaha, Nebraska facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms

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The Respondent argues that the judge erred by not placing rejected exhibits–related to the Respondent's past practice argument–in a rejected exhibits file. While we agree that the judge erred by not placing these exhibits in a rejected exhibits file, we find that this error was not prejudicial and therefore does not require reversal of the judge's decision or remand.

[14] Here, the collective-bargaining agreement did not, with sufficient specificity, incorporate by reference the 401(k) plan and its governing documents, including any reservation of rights language included therein. See *Amoco Chemical*, supra, 328 NLRB 1220; *Trojan Yacht*, supra, 319 NLRB 741. We find that, even under the more lenient standard applied by the U.S. Court of Appeals for the D.C. Circuit, the parties' agreement did not incorporate by reference the 401(k) plan documents. See, e.g., *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350 (2008). The 401(k) plan and its governing documents were created after the parties negotiated their collective-bargaining agreement. Therefore, the Union cannot be said to have acceded to the reservation of rights language in the plan documents merely by referencing, in the agreement, the possibility that a 401(k) plan might be created in the future.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2009.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 17 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 30, 2011

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN PEARCE, dissenting in part.

I dissent from the dismissal of the complaint allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally freezing accrual of pension benefits for unit employees. The Respondent argues, and the majority holds, that the Union waived its right to bargain over that subject based on a combination of factors, including unilateral language in the underlying pension plan document, ambiguous contractual language, and the Union's acquiescence in an allegedly similar prior change. In agreement with the judge, I find that these factors, even considered in combination, do not evince a "clear and unmistakable" waiver of the Union's right to bargain about changes to the pension plan.

As the Board has often explained, granting an employer the right to act unilaterally with respect to employment terms that are subject to bargaining under the Act "is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact." *Provena St. Joseph Medical Center,* 350 NLRB 808, 813 (2007), quoting *C & C Plywood Corp.*, 148 NLRB 414, 417 (1964), enf. denied 351 F.2d 224 (9th Cir. 1965), reversed 385 U.S. 421 (1967). For that reason, the Board, with court approval, has required "clear and unmistakable" evidence of waiver and has construed waivers narrowly. *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 708 (1983). The "clear and unmistakable" waiver standard "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena*, supra at 811.

The primary factor that the majority and the Respondent contend supports a finding of waiver is language in the underlying pension plan document stating that the Respondent reserves "the right at any time to amend the Plan," including "determin[ing] all questions relating to the eligibility of Employees to participate or remain a Participant hereunder and to receive benefits under the Plan." The majority's reliance on this language stands in stark contrast to previous Board decisions holding that reservation of rights language contained in outside plan documents will not support a finding of waiver unless the plan documents are expressly incorporated by reference into the parties' collective-bargaining agreement. *Amoco Chemical Co*., 328 NLRB 1220 (1999), enf. denied 217 F.3d 869 (D.C. Cir. 2000); *Trojan Yacht,* 319 NLRB 741, 742 fn. 5 (1995). The Respondent in this case unilaterally created the underlying pension plan document, including the reservation of rights language. The parties never bargained over the document and it was not incorporated by reference into the collective-bargaining agreement. The record does not reveal when the Respondent first introduced the reservation of rights language. Hence, we do not know whether it was introduced before or after the parties negotiated the 2005–2009 collective-bargaining agreement, which was in effect when the Respondent made the unilateral change at issue here. Regardless of when it was introduced, however, there is no evidence that the language was "fully discussed and consciously explored" or that "the union consciously yielded or clearly and unmistakably waived its interest in the matter." *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998) ("either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter"), enfd. 176 F.3d 494 (11th Cir.), cert. denied 528

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

U.S. 1061 (1999). Indeed, there is no evidence that the Union was even aware that the language existed prior to the events that gave rise to these proceedings.

My colleagues attempt to get around these facts by observing that the pension plan "could only be understood by reference to the plan documents and existing practice," because the collective-bargaining agreement did not describe the pension plan. However, the Board has specifically declined to adopt that approach. In *Amoco*, the respondent claimed that the union waived its right to bargain about changes in a medical plan that covered both its unit and nonunit employees, based on reservation of rights language in the underlying plan documents. As in the present case, the collective-bargaining agreements did not provide a description of the benefits available under the plan, and the plan documents were the primary reference for identifying the benefits secured through the contract. The Board nevertheless found that reservation of rights language could not be relied upon to establish a waiver of the union's right to bargain over changes in the medical plan because: (1) the outside plan documents were not expressly incorporated by reference into the parties' collective-bargaining agreement; (2) the plan documents were not collectively bargained; (3) the parties had never discussed or bargained about the reservation of rights language in the plan documents; and (4) there was no direct evidence that union officials were aware of the language. 328 NLRB at 1222 (observing that "[o]bviously, the AMP summary plan description is a primary reference for identifying the medical insurance benefits that the Respondent has contractually agreed to provide unit employees," but nevertheless holding "[t]he record here will not, however, support finding that the entirety of this non-negotiated corporate document was part of the parties' collective-bargaining agreement and so establishes the Unions' waiver of their statutory right to so bargain about the AMP benefits.").

I recognize that the Court of Appeals for the D.C. Circuit refused to enforce the Board's order in *Amoco*. However, the court applied the "contract coverage" doctrine articulated in *US Postal Service v. NLRB*, 8 F.3d 832, 837 (D.C. Cir. 1993) and *Department of Navy v. FLRA,* 962 F.2d 48, 57 (D.C. Cir. 1992), and rejected the "clear and unmistakable waiver" standard applied by the Board. 217 F.3d at 873.[1] Notwithstanding *Amoco* and similar court decisions, the Board has continued to adhere to the "clear and unmistakable waiver" standard and has declined to adopt the less stringent "contract coverage" doctrine. *Provena*, supra at 811 (reaffirming "clear and unmistakable waiver" standard and rejecting "contract coverage" doctrine). The majority pays lip service to the "clear and unmistakable" waiver standard, but their analysis constitutes a radical departure from it. Compare *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1358 (D.C. Cir. 2008), enfg. in part, vacating in part 348 NLRB 1344 (2006), where the court, although finding no violation under the "contract coverage" doctrine, agreed with the Board that unions did not "clearly and unmistakably" waive their right to bargain over changes to future retirement benefits for active unit employees by not challenging reservation of rights language in outside plan documents, explaining that "[n]othing in the record suggests that the unions, by not negotiating over the clauses, contemplated waiving their right to bargain . . . . Absent such indication, we cannot conclude that the unions clearly and unmistakably decided to waive their bargaining rights."

The majority attempts to avoid the precedential authority of *Amoco* and *Trojan Yacht* by pointing out that the reservation of rights language is but one of several factors in this case that, in their judgment, support a finding that the Union knowingly waived its interest in bargaining over changes in the pension plan. In this regard, they cite two provisions in the collective-bargaining agreement that, when considered in conjunction with the reservation of rights language, in their view support a finding that the Union waived its bargaining rights.

The first provision cited by the majority, contained in article 28 of the collective-bargaining agreement provides, "Inasmuch as the plans cover all employees, not just bargaining unit employees, changes in these plans are not subject to Article Five of the Agreement [the grievance and arbitration clause]." The second provision, contained in the same article, provides "The Company will advise the Union of proposed changes and meet to discuss and explain changes if requested." Alone or in combination, these two provisions fall far short of establishing that the Union "consciously yielded or clearly and unmistakably waived its interest" in bargaining over changes to the pension plan. *Georgia Power*, supra at 420–421. This conclusion follows from even a cursory examination of Board precedent.

In evaluating whether there has been a contractual waiver, the Board considers the precise wording of the relevant contract provisions. *Metropolitan Edison Co. v. NLRB,* supra at 708 ("we will not infer from a general contractual provision that the parties intended to waive a

[1] As the court explained:

[T]he "covered by" and "waiver" inquiries are analytically distinct:

A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective-bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant.

Id. at 873 (quotations and citations omitted, emphasis in original).

statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable"). "To meet the 'clear and unmistakable' standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp*., 330 NLRB 1363, 1365 (2000); *Lear Siegler, Inc.*, 293 NLRB 446, 447 (1989) (waivers of employee rights must, however, be explicitly stated, clear and unmistakable). In the absence of "either an explicit contractual disclaimer or clear evidence of intentional waiver during bargaining," an employer is not authorized to change, unilaterally, a term or condition of employment that is a mandatory subject of bargaining. *Provena*, supra at 815.

Clearly, the provisions cited by my colleagues do not amount to an "explicit contractual disclaimer" of the right to bargain over changes in the pension plan. Id. Nor has the Respondent offered any evidence of bargaining history to show that the meaning and potential implications of the provisions were "fully discussed and consciously explored" and that, by agreeing to the language, the Union "consciously yielded or clearly and unmistakably waived its interest" in bargaining over such changes. *Georgia Power*, supra at 420–421. The provisions consequently lack the specificity required to support a finding of waiver. See *Bonnell/Tredegar Industries*, 313 NLRB 789, 791 (1994), enfd. 46 F.3d 339 (4th Cir. 1995), (similar contractual provision exempting certain benefits from contractual grievance and arbitration procedure did not constitute a waiver). See also *Trojan Yacht*, supra at 741, 742–743 (contractual provision stating that pension plan "will be maintained in the same manner and to the same extent such plans are generally made available and administered on a corporate basis," considered in conjunction with reservation of rights language in the underlying plan document, did not waive union's right to bargain over the respondent's decision to freeze benefit accruals in pension plan covering both unit and nonunit employees); *Rockford Manor Care Facility*, 279 NLRB 1170, 1172–1173 (1986) (contractual provision stating that health and life insurance would be offered to represented employees on the "same basis" as to nonunit employees "though implying assent to the principle of a single unified, company wide program, [did] not convey an intent on the part of the Union to waive its right to participate in deliberations about which option was the more appropriate for all.").

The majority submits that, by specifying that the Respondent is obligated to "discuss" rather than bargain over changes to the pension plan, the parties intended to grant the Respondent the right to act unilaterally. However, the word "discuss" is subject to varying interpretations. Furthermore, it is preceded by the phrase "*proposed* changes" (emphasis added). The common understanding of the term "propose" in labor-management relations is to set forth for acceptance or rejection, in an attempt to reach agreement or mutual consensus on an issue. The juxtaposition of these two expressions–"proposed changes" and "discuss"–is, at best, ambiguous. In light of this ambiguity and absent the aid of bargaining history to shed light on the intent of the parties, I would not interpret the word "discuss" as intended to operate as a waiver of the Union's statutory right to bargain. Rather, I would find that the plain meaning of "proposed" when paired with "discuss" in article 28 favors the interpretation that the parties intended in some manner to preserve the Union's rights to bargain about changes to the pension plan. All this is irrelevant conjecture, though. For, in determining whether there has been a contractual waiver of a statutory right, the applicable standard is not whether contractual language could reasonably be interpreted as a waiver, but rather whether such an interpretation is supported by "clear and unmistakable language." *Elliott Turbomachinery Co.*, 320 NLRB 141, 143 (1995) ("when there are two equally plausible interpretations of ambiguous contract language, one granting management an unrestricted right to [change a mandatory subject of bargaining] and one requiring management to first consult with the Union, . . . considerations of Federal labor policy militate in favor of the latter interpretation."); *Owens-Brockway Plastic Products, Inc.,* 311 NLRB 519, 525 (1993) ("The critical question is not, however, whether . . . [the right to act unilaterally] might reasonably be inferred from the management-rights clause; it is whether that interpretation is supported by "clear and unmistakable language."). See also *NLRB v. New York Telephone Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991) (no waiver will be implied "unless it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them. We will not thrust a waiver upon an unwitting party."). For the reasons discussed above, the language at issue here does not meet the clear and unmistakable standard.

Because the standard is well established, the parties presumably knew that "clear and unmistakable" language was necessary to create a waiver of the Union's statutory right to bargain over changes to the pension plan. See, e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956) (collective-bargaining agreement "must be read as a whole, and in the light of the law relating to it when made"). If they intended to create such a waiver, they

surely would not have used the language at issue here, which is far from clear. Indeed, the reservation of rights clause cited by the majority shows that the Respondent knew how to draft unambiguous language reserving to itself the right to make unilateral changes in the pension plan. As discussed above, however, there is no evidence that the Union consented to the reservation of rights language or to any other language explicitly waiving its right to bargain.[2]

The majority's reliance on the Union's failure to object to a single allegedly similar unilateral change in the pension plan in 2005 is equally misguided. "It is well established that union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past." *Provena*, supra at 815 fn. 35, quoting *Amoco*, supra at 1222 fn. 6. These principles have been applied in cases involving facts very similar those here, that is, cases where an employer argued that reservation of rights language in an outside plan document, in combination with a union's failure to object to similar changes in the past, established that the union had waived its right to bargain over changes in the plan. *Amoco*, supra at 1222, fn. 6 (rejecting argument that the union's failure to object to prior changes, in conjunction with language in outside plan document, proved that union had waived its interest in bargaining.[3] *Georgia Power,* supra at 421 fn. 9 (reservation of rights language in outside plan document did not establish a waiver).[4] See also *Southern Nuclear Operating Co. v. NLRB*, supra at 1358 (rejecting argument that combination of reservation of rights language in outside plan document and the union's failure to object to similar changes in the past established a "clear and unmistakable" waiver).[5]

In sum, the majority's decision ignores applicable law and dilutes or abandons the Board's traditionally stringent test for determining whether there has been a waiver of a statutory right. I therefore dissent and, like the judge in this case, I would find that the Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with notice and an opportunity to bargain prior to freezing the accrual of future pension benefits.

Dated, Washington, D.C. December 30, 2011

Mark Gaston Pearce, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

Under the parties' collective-bargaining agreement, unit employees secured the right to participate in the Respondent's company-wide 401(k) plan on the express condition that the plan would be governed by plan documents unilaterally created by the Respondent. In addition to establishing unit employees' substantive benefits under the plan, the plan documents clearly reserve to the Respondent the right to make changes to the plan, including the discretion to offer or cease matching contributions and to set their amount. I disagree with my colleagues that the Respondent—after the collective-bargaining agreement had expired, but while the parties bargained in good faith for a successor agreement—

[2] The majority opines that if "the parties intended to convey a bargaining obligation with respect to changes to the pension plan, they would have used the term 'bargain' rather than 'discuss'" in Art. 28. They note that elsewhere in the contract, the parties' used the word "bargain" where they meant to convey that meaning. In this regard, they point to art. four ("Jurisdiction"), which provides, inter alia: "The company recognizes the Union as the sole and exclusive collective bargaining agent for the purpose of collective bargaining concerning wages, hours and other conditions of employment for employees covered by this agreement." In making this argument, the majority overlooks the fact that pension benefits are a "condition[] of employment" as to which the Respondent in art. four recognizes the Union's right to bargain. More fundamentally, however, the majority's analysis turns the clear and unmistakable waiver standard on its head. A union is not required to secure a contractual commitment in order to preserve statutory rights. As the Board and courts have made clear time and time again, contractual waiver is an affirmative defense and the burden is on the party claiming the existence of such a waiver to show that the waiver is "explicitly stated, clear and unmistakable." *Allied Signal Aerospace*, 330 NLRB 1216, 1228 (2000), review denied sub nom *Honeywell Intern., Inc. v. NLRB,* 253 F.3d 125 (2001). Accord: *Provena,* supra at 811 ("The clear and unmistakable waiver standard, then, requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply."). Whatever the scope of the Respondent's contractual obligation, there is no basis for finding that the Union waived its statutory right to bargain over changes to the pension plan.

[3] The Board explained: "It is well established the "union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may any acquiesced in the past."'

[4] The Board further held:

> That the Union did not protest or demand to bargain over previous unilateral changes in retirement benefits does not require a different result. The Board has consistently held that a union that acquiesces in an employer's unilateral changes in terms and conditions of employment does not irrevocably waive its right to bargain over such changes in the future.

[5] The court explained: "Each time the bargainable incident occurs . . . the] Union has the election of requesting negotiations or not." 524 F.3d at 1358 (citation and internal quotation marks omitted).

violated Section 8(a)(5) and (1) when it exercised this reserved right by suspending matching contributions. Fundamental fairness and plain logic dictate that, just as plan benefits enjoyed by unit employees survive the contract's expiration, so too must the Respondent's ability to exercise its corresponding rights under a company-wide plan.

The parties here consciously bargained over unit employees' participation in several contractual benefits plans,[1] including the Respondent's 401(k) plan.[2] The parties' agreement does not contain the terms and conditions of the plans, or any of the parties' attendant obligations. Rather, these important details are established entirely in the plans' governing documents. These documents include reservation of rights language, which pertinently provides that the Respondent has the discretion to make matching contributions, "if any," "equal to a set percentage . . . which percentage the Employer will determine each year."[3] I join Member Becker in finding that the Respondent lawfully implemented unilateral changes to its pension plan in January 2009 pursuant to these terms. In my view, the same reasoning compels a finding that the Respondent also acted lawfully when it unilaterally changed its 401(k) plan a few months later, in reliance on these same provisions.

In 2005, the Union did not object when the Respondent implemented the 401(k) plan contemplated by the collective-bargaining agreement, including the governing documents at issue here. Following the expiration of the parties' collective-bargaining agreement in February 2009, the Respondent was required to maintain the terms and conditions of the expired agreement until the parties negotiated a new agreement or bargained in good faith to impasse.[4] Under this duty to maintain the status quo, the Respondent was thus required to continue to provide unit employees with the full range of benefits under the 401(k) plan, and to operate the plan in the same manner as it had during the contract's term.[5] The Respondent's compliance with this duty could only be measured by referring to the plan's governing documents.

In April 2009, the Respondent modified the 401(k) plan by suspending matching contributions to employees' plan accounts. This action was entirely consistent with the status quo because, as explicitly established in the plan documents, the Respondent possessed the discretion to determine matching contribution rates. My colleagues nonetheless find that the Respondent violated the Act by exercising this contractual right. I respectfully disagree.

Concededly, there is extant precedent that supports my colleagues' position. Given the particular facts here, however, applying that precedent represents an inequitable and inconsistent application of the Respondent's status quo obligation. Again, under this obligation, the Respondent must maintain the substantive terms of the 401(k) plan, established by its governing documents as opposed to the expired contract. The Respondent's reserved right to make the disputed change here, detailed in the same documents, is a discrete, specific, and integral component of the plan and thus inextricably linked to the very substantive terms the Respondent must honor. Yet, the majority's decision punishes the Respondent for making this change. It hardly advances collective bargaining to require that some portions of the parties' negotiated agreements–i.e. those favorable to the union–survive contract expiration while others–those favorable to the employer–do not.

In assessing whether an employer has honored its status quo obligation, governing plan documents are integral to the analysis. For example, the Board looks to such documents to determine whether to include additional amounts, beyond payments for missed contributions to a benefit plan, as part of make-whole relief.[6] Similarly, the Board has held that an expired contract, including plan documents referenced in the contract, are sufficient together to satisfy section 302(c)(5)'s requirement that employer payments into union trust funds must be detailed in a "written agreement."[7] Following contract expiration, controlling plan documents establish "the framework under which benefit payments will be administered and disbursed."[8] Given that the Board relies upon the terms of the plan documents to define an

[1] Art. 28 of the contract provides:

The Company acknowledges that bargaining unit employees are eligible to participate in the retirement plan, group hospital, loss of time and life insurance programs provided the requirements for participation are met. The Company will advise the Union of proposed changes and meet to discuss and explain changes if requested. Inasmuch as the plans cover all employees, not just bargaining unit employees, changes in these plans are not subject to article Five of the Agreement [the grievance and arbitration clause]. Employees may retire at age 65.

[2] Art. 28 further provides that "[t]he Company agrees that if the Omaha World-Herald Newspaper board of directors approves the implementation of a 401(k) plan for its employees, bargaining unit employees will be eligible to participate in such plan the same as all other employees based on the provisions of the plan adopted."

[3] See art. II ("Contributions") of the 401(k) Summary Plan Description.

[4] See *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 544 fn. 6 (1988) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)).

[5] See *Laborers*, 484 U.S. at 544 fn. 6.

[6] See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[7] *Made 4 Film, Inc.*, 337 NLRB 1152, 1152 fn. 2 (2002) (citing *Hinson v. NLRB*, 428 F.2d 133, 138–139 (8th Cir. 1970)).

[8] *Hinson v. NLRB*, supra at 139.

employer's continuing status quo obligations, the Board's anomalous practice of ignoring those same plan documents in assessing an employer's status quo rights, makes little sense and lacks any persuasive policy justification.

To the contrary, the precedent on which my colleagues rely undermines collective bargaining and industrial stability. Under the logic of that precedent, the Respondent and other similarly situated employers who have created benefit plans on the condition of retained discretion are forced to "use or lose" their right to make necessary changes in benefit plans before the contract expires. It hardly advances the collective-bargaining process to create so powerful an incentive for employers to inject such changes into the collective bargaining mix during the sensitive period immediately prior to contract expiration, when the parties should be seeking to narrow their differences rather than create new ones.

This precedent also discourages employers from establishing company-wide health and benefit plans. Such plans offer considerable advantages to both employers and employees. These large-scale plans create economies of scale that reduce costs and increase administrative efficiency, allowing employers to offer stronger and more comprehensive benefit packages. For union-represented employees, participation in company-wide plans provides an often attractive alternative to many grossly underfunded and frequently mismanaged multi-employer benefit plans. Such plans also help to ensure benefit parity with nonunit employees. Under the majority's holding, however, employers will be deterred from offering these mutually beneficial plans. When contracts expire and parties bargain for successor agreements, employers will be required to freeze benefits in place, unit by unit, creating a patchwork of plans. Faced with this significant administrative hurdle and the unavoidable costs that will accompany it, employers will likely consider abandoning such plans, at least in industries with a union presence.

Accordingly, for these reasons, I would reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by its April 2009 modification to the 401(k) plan. I would therefore dismiss the complaint in its entirety.

Dated, Washington, D.C. December 30, 2011

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Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Teamsters District Council 2, Local 543M, affiliated with the International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the employees in the unit by unilaterally ceasing matching contributions to unit employees' 401(k) plan accounts. The unit is:

> All regular full-time and regular part-time journeyman pressmen and apprentice pressman, including leadmen, employed by the Employer at its facility in Omaha, Nebraska, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the Union as the exclusive representative of the employees in the unit with respect to matching contributions to employees' 401(k) plan accounts until agreement or good-faith impasse is reached, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL rescind the unlawful change we made to the 401(k) plan on April 1, 2009, and make unit employees whole, with interest, for any losses they suffered as a result of our unlawful change.

OMAHA WORLD-HERALD

William F. LeMaster, for the General Counsel.
Glenn E. Plosa and *L. Michael Zinser, Esqs. (Zinser Law Firm),* of Nashville, Tennessee, for the Respondent.
David A. Grabhorn, of Fullerton, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Omaha, Nebraska, on July 21–22, 2009, upon a complaint issued on April 29, 2009, by the Regional Director for Region 17. The complaint is based upon an unfair labor practice charge filed on January 22, 2009, later amended, by Teamsters District Council 2, Local 543M, affiliated with International Brotherhood of Teamsters[1] (the Union or the Charging Party). The complaint alleges that Omaha World-Herald (the Respondent), has committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act. Respondent denies the allegations in their entirety. All parties have filed posthearing briefs and they have been carefully considered.

ISSUES

Although there is little disagreement about the underlying facts, the two biggest differences concern: (1) whether the wording of article 28 of the collective-bargaining agreement establishes that the Union consciously relinquished the right to engage in midterm bargaining over the pension plan, i.e., whether since the collective-bargaining contract had been reopened, Respondent was privileged to ignore the Charging Party's demand to bargain over pension plan changes; (2) the viability of past practice as a defense, i.e., whether numerous previous changes to the pension plan and 401(k) plan constitute the Union's waiver of the right to bargain.

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits it is a Delaware corporation with an office and place of business in Omaha, Nebraska, and is engaged in the publication and distribution of a daily newspaper, the *Omaha World-Herald*. It further admits that during the past year, in the course and conduct of its business, it has derived revenues in excess of $200,000, held membership in or subscribed to various interstate news services, and advertised various nationally sold products, including AT&T services. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2] In addition, Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

For the most part the facts are not in significant dispute. Respondent has had a long collective-bargaining relationship, through predecessors, with Graphic Communications Union Local 543-M, which has been affiliated with Teamsters District Council 2 since September 2004. The bargaining unit is:

> All regular full-time and regular part-time journeyman pressmen and apprentice pressman, including leadmen, employed by the Employer at its facility in Omaha, Nebraska, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

Since the 1996 collective-bargaining agreement, all of the agreements have included an article 28, titled "Benefits." In 1996, that article read:

> The Company acknowledges that employees are eligible to participate in the retirement plan, group hospital, loss of time and life insurance programs provided the requirements of participation are met. The Company will advise the Union of proposed changes and meet to discuss and explain changes if requested. Inasmuch as the plans cover all employees, not just bargaining unit employees, changes in these plans are not subject to Section Five of the Agreement. [The grievance-arbitration clause.] Employees may retire at age 65.

In the parties' 1999 collective-bargaining agreement, article 28 reiterated the above paragraph, but added another paragraph aimed at the possibility that a 401(k) plan might be established. The new insert says:

> The Company agrees that if the Omaha World-Herald Newspaper Board of Directors approves the implementation of a 401(k) Plan for its employees, pressroom employees will be eligible to participate in such a plan the same as all other employees based on the provisions of the plan adopted.

In the parties' most recent collective-bargaining agreement, executed in 2004, article 28 was slightly revised. In the first sentence of the first paragraph, the term "employees" was changed to "bargaining unit employees." In the second paragraph, the term "pressroom employees" was changed to "bargaining unit employees."

The 2004 collective-bargaining agreement was scheduled to expire on February 5, 2009. On October 3, 2008, the Union sent Respondent a re-opener letter to begin negotiations for a new collective-bargaining agreement. Respondent's corporate human resources manager, Steve Hoff, replied with a letter announcing the company's intent to terminate the collective-bargaining agreement at 12:01 a.m. on February 5, 2009. This, of course, set the stage for negotiations.

The parties held their first bargaining session on December 22, 2008. At the time of the hearing, no new contract had been reached.

B. Unilateral Changes to the Pension Plan

Respondent has provided a pension plan for its employees since 1947. Since at least 1993, the plan has allowed participants to accrue benefits on a monthly basis, calculated by years of service and earnings.

In 2005, Respondent terminated pension plan participation for all employees under 50 years old, as well as employees who were over 50 but not yet vested in the plan. As a substitute, Respondent created a retirement spin-off plan for those affected. The spin-off plan was both created and dissolved on December 31, 2005. Upon dissolution of this spin-off, the

[1] This is the Charging Party's correct name and the caption has been corrected to fix an omission in the original caption.

[2] *Nutley Sun Printing Co.*, 128 NLRB 58 (1960).

spun-off employees were given the opportunity to take their money in one of four ways:

(1) Cash distribution,
(2) Roll it into a qualified plan such as an IRA,
(3) Roll it into Respondent's newly created 401(k) plan (discussed below), or
(4) Have an annuity purchased for them, which would basically furnish them the same benefit that they had on a monthly annuity basis at the time of their retirement.

The Union did not raise any objections to this 2005 unilateral change. The record does not reflect the choices the employees made.

Three years later, on November 12, 2008, 5 weeks after the reopener/cancellation notices, and 5 weeks before bargaining commenced in late December, Respondent notified Union Chapel Chairman Patrick Edmunds that it planned to freeze further accrual in the pension plan for the remaining active participants, effective December 31, 2008. The cover letter stated that Respondent had mailed notification of the changes to all active pension plan participants to inform them of this decision. The change was, therefore, a fait accompli. Edmunds promptly notified the Union's business representative Mike Maddock of Respondent's decision; Maddock forwarded the announcement to David Grabhorn, Vice President "A" for Teamsters District Council 2.[3] The two union officials are officed in California.

A short time later, Respondent approached Maddock to explore the Union's willingness to agree to a voluntary buy-out offer to four named senior pressmen. Maddock reported the approach to Grabhorn. Grabhorn advised Hoff to arrange a meeting to discuss the buy-out proposals. During the call, Grabhorn also told Hoff that the Union was now insisting upon bargaining over Respondent's plan to freeze further accrual in the pension plan.

On November 19, 2008, Grabhorn, Edmunds, and Local President Steve Ryan met with Hoff, human resources/in-house counsel Sue Loerts and manager Christy Gerrick. After discussing the buy-out issue, Grabhorn reiterated the Union's insistence on bargaining over the scheduled pension plan change. Hoff told Grabhorn that the issue had already been bargained between the parties and Respondent had the right to make such changes to the pension plan. Grabhorn responded by denying that there had ever been such bargaining, stating that any changes needed to be agreed upon at the bargaining table.

Subsequent to this meeting, Grabhorn and Michael Zinser, Respondent's legal counsel, agreed to schedule an initial bargaining session for December 22, 2008. At that session, the two sides exchanged initial contract proposals and unsuccessfully attempted to determine ground rules. On December 29, Grabhorn wrote a letter to Zinser proposing dates for further contract negotiations. Additionally, Grabhorn insisted that Respondent not make any changes to the status quo and not implement any changes to the pension plan until after bargaining had concluded.

[3] Mr. Grabhorn is also a licensed attorney and served as counsel to the Union during the hearing.

Zinser sent a letter in response, dated December 31, telling Grabhorn that, under article 28 of the existing collective-bargaining agreement, Respondent had the right to unilaterally change the pension plan. He added that the parties had "already agreed upon the Company's right to make these changes during the term of the current contract. Local 543-M was notified on November 12, 2008, of this change." Zinser specifically cited the portion of article 28 that reads: "Inasmuch as the plans cover all employees, not just bargaining unit employees, changes in these plans are not subject to Article Five of the Agreement." Finally, Zinser wrote that the pension plan itself reserved the right for Respondent to change the plan. Steve Hoff later testified consistently with Zinser's claim when he stated that Respondent relied on section 2.3 of the plan to interpret the plan, section 8.1 of the plan to amend it, and section 9.1 of the plan to terminate it.

As announced, Respondent did implement the pension plan change on January 1, 2009. On January 21, Grabhorn protested, writing that the parties had not agreed that Respondent could unilaterally make changes to the pension plan. He wrote that the collective-bargaining agreement did not contain any waiver of the Union's statutory negotiating rights, that the law required Respondent to maintain the status quo while negotiations were on-going, and that the Union would file an unfair labor practice charge concerning the change.

Both agree there have been numerous changes related to the pension plan over the years. The question is how material these changes have been and how significant their impact has been upon the employees. Respondent introduced numerous exhibits which, it claimed, show a significant history of past practices that demonstrates a waiver by the Union. However, federal tax laws required many of these changes. Meanwhile, those that were not affected by the tax laws were of minimal importance, or were internal operational matters having no consequence upon plan participants. The only change of real significance was the 2005 change, which, as noted, the Union did not oppose.

C. Unilateral Changes to 401(k) Plan

Respondent first allowed a portion of its bargaining unit employees to participate in a 401(k) plan on January 1, 2006. The implementation of this plan was based on paragraph 2 of article 28, which states:

> The Company agrees that if the Omaha World-Herald Newspaper Board of Directors approves the implementation of a 401(k) Plan for its employees, pressroom employees will be eligible to participate in such a plan the same as all other employees based on the provisions of the plan adopted.

To implement this plan, the *Omaha World-Herald* became a participant in the Midlands 401(k) Plan, begun by Midlands Newspapers, Inc., its sister company, which allowed for employees to invest up to 5 percent of their wages with a 50 percent match from their employer. On January 1, 2007, the Midlands plan changed its name to the *Omaha World-Herald 401(k) Plan*. A year later, on January 1, 2008, Respondent's corporate parent consolidated all the 401(k) plans operated by its subsidiaries and formed a new plan. The new plan adopted a

model created by the Koley Jessen law firm. Each subsidiary employer now had discretion over the amount its matching contribution, if any, it would be. Employees who still remained in the pension plan were not allowed to take part in the matching aspect of the program, though they could open an account and make deposits. On January 1, 2009, when the pension accrual freeze went into effect, those employees were made eligible for the 401(k) matching contribution.

On March 2, 2009, Hoff delivered another missive to Chapel Chairman Edmunds via the night supervisor. In the letter, Hoff stated that the letter was intended to give the Union advance notice that "effective April 1, 2009, the Respondent intended to suspend its discretionary matching contribution to all employee 401(k) deferrals for the remainder of the 2009 Plan Year."[4] Edmunds immediately informed Grabhorn and Maddock. On March 3, Respondent posted a notice on a bulletin board at its facility to inform all participating employees of its decision to suspend its matching contributions. On April 1, 2009, while still in the midst of ongoing contract negotiations, Respondent implemented the change. This all occurred, of course, after the preceding collective-bargaining contract had ended, but at a time when bargaining was under way.

III. ANALYSIS AND CONCLUSIONS

Counsel for the General Counsel contends that Respondent violated Section 8(a)(5) and (1) of the Act by materially amending the defined benefit pension plan and the 401(k) retirement plan without affording the Union an opportunity to bargain with Respondent about these changes. Respondent agrees it unilaterally amended the plans. However, it asserts that the collective-bargaining agreement, past practice, and the various plan documents provided it with the explicit right to make these changes.

A. Pension Plan

Respondent admits to materially amending the pension plan when it eliminated the future accrual of pension benefits. Respondent contends it had the right to make the changes unilaterally because (1) the 2004 collective-bargaining agreement contained a "clear and unmistakable" waiver in article 28; (2) this involved a reasonable interpretation of a contract clause, and since this is a contract dispute, it is beyond the authority of the Board to deal with it; (3) the Union had waived its right to bargain due to the past practice of the parties; and (4) the Pension Plan document reserved Respondent's right to make unilateral changes because it had been incorporated into the collective-bargaining agreement.

1. Clear and unmistakable waiver standard

The Act is well settled concerning claimed waivers of statutory rights. The Board has adhered to the clear and unmistakable waiver standard as far back as 1949.[5] Since then, the Supreme Court has held that a waiver of employee statutory rights will not be inferred from general contractual provisions. Moreover, to be recognized, the waiver must be clear and unmistakable.[6] History, then, establishes that the Board has consistently utilized this standard.[7]

Accordingly, Respondent must show that the Union clearly and unmistakably waived its right to bargain about the pension plan. Respondent points to the revised article 28, found in the 2004 collective-bargaining agreement, as the clear and unmistakable waiver in this case:

> Inasmuch as the plans cover all employees, not just bargaining unit employees, changes in these plans are not subject to Article 5 of the Agreement. [The grievance-arbitration clause.]

Respondent contends that, since the parties agreed the pension plan was not grievable and not arbitrable, the clause constitutes a clear and unmistakable waiver of the union's right to bargain over any changes to the pension plan.

Furthermore, the sentence prior to the article 5 reference raises other issues. It states:

> The Company will advise the Union of proposed changes and meet to discuss and explain changes if requested.

The dictionary definition of "discuss" provides multiple potential meanings, including: (a) "to investigate by reasoning or argument; (b) "to present in detail for examination or consideration . . ."; or (c) "to talk about."[8] Accordingly, the agreement to "discuss" could mean either (b) or (c). If so, must Respondent simply tell the Union of its plans, or, after telling the Union, would the issue would be up for debate and negotiation, as one would see in traditional bargaining? The point is not which definition applies, but rather, the fact that multiple definitions could apply. Beyond that, the phrase "meet to discuss and explain changes" provides separate meanings if the connector "and" is taken in either the conjunctive or the disjunctive. In the disjunctive, the discussion and explanation are unrelated. In the conjunctive, the discussion and the explanation are to occur simultaneously. These simple linguistic variants also demonstrate that a finding of a "clear and unmistakable" waiver cannot be made. There are simply too many choices. Accordingly, the phrase must be deemed ambiguous. In my view, Respondent's logic is too untethered to conclude that the Union ever waived its right to bargain.

2. Contract coverage approach

As an alternative theory, Respondent asserts that language in the collective-bargaining contract authorizes it to make pension

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[4] That meant that the newly eligible—those whose pension benefits had been frozen on December 31, 2008—could only obtain 3 months of the match in their newly opened 401(k) account.

[5] *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949). In addition, *Tide Water* has special application here, as the plans in question covered all of Respondent's employees, not simply the represented employees. In that circumstance, the Board in *Tide Water* observed: ". . . practical difficulties encountered by an employer in negotiating about a pension plan with the representative of a portion of his employees, all of whom are covered by a company-wide pension plan, do not eliminate his duty to bargain within an appropriate unit."

[6] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[7] See *Johnson-Bateman Co.,* 295 NLRB 180 (1989); *Provena Hospitals*, 350 NLRB 808 (2007); *Verizon North, Inc.*, 352 NLRB 1022 (2008); *Quebecor World Mt. Morris II, LLC*, 353 NLRB 1 (2008).

[8] *Merriam-Webster Online Dictionary*.

plan changes. This defense is not on waiver grounds, but is instead a contention that the Union is trying to obtain a benefit that it could not when it entered into the collective-bargaining contract. According to this theory of defense, the contract already governs matters concerning pension plan changes, in the sense that the Union has, under the expressly bargained-for terms of the agreement, specifically permitted Respondent to take the steps that it took. As Respondent readily acknowledges, it seeks to invoke the so-called "contract-coverage" defense, which has had some limited success at the appellate court level and has acquired some followers at the Board level. The theory has not been addressed by the Supreme Court under that name.

Indeed, the proponents of this defense seem to have deliberately ignored Supreme Court law on the point which has specifically adopted the Board's traditional "clear and unequivocal waiver" analysis in disputes such as this. A unanimous Court in *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), reh. den. 386 U.S. 939 (1967), an icon case which is well embedded in Board jurisprudence, rather thoroughly discussed the appropriate analysis to be applied. Indeed, in my view, it specifically rejected the model that is now being described as the contract-coverage theory. A short discussion will illustrate the point.

In *C & C Plywood*, the employer and the union had entered into a collective-bargaining contract which established specific wage rates for each job in the plant, the so-called 'classified wage scale.' The contract stated that the issue of wages were 'closed' during the life of the contract. Indeed, although there was a grievance process, the contract did not provide for arbitration of any dispute. But, the contract did allow the employer an option to pay a premium rate to any employee who had shown some special fitness, skill, or aptitude. Less than 3 weeks after the collective-bargaining agreement was signed, the employer announced that its glue spreader crews would receive a premium rate if they met certain weekly/monthly production standards. The union complained that not only was this a departure from the classified wage scale, it was actually a wage system inconsistent with the negotiated terms, that is, an unlawful unilateral change. The employer responded by invoking the premium pay provision as a legitimate justification. It asserted that the new pay system should be considered a reward for any employee who had shown some special fitness, skill, or aptitude.

Charged as an unfair labor practice under Section 8(a)(5), the trial examiner dismissed the complaint on the grounds that it was a contract dispute. The Board reversed, ruling that the union had not ceded power to the employer to unilaterally change the wage system from one which permitted particular employees to receive premium pay for their special skills, to one which incentivized the higher scale on the level of production met by the crew as a whole.

It can readily be seen that *C & C Plywood* is nearly congruent with the facts adduced here. As in that case, the collective-bargaining contract here contains a clause which Respondent asserts permits it to have made the changes in the pension plan, even though even a casual reading shows that the clause does not clearly apply—much like the clause in *C & C Plywood* can be seen as not addressing what the employer did. In *C & C Plywood,* the employer argued that since the contract contained a provision which might have allowed the employer to institute the wage plan in question, the Board was powerless to determine whether that provision did authorize the change. Being powerless, it argued, the Board had no authority, and the matter needed to be decided under contract law, most likely Section 301 of the Act.

The Court was not persuaded. It held that the Board was not construing the collective-bargaining contract in order to determine the nature of the contractual rights that the agreement accorded the parties. Instead, it observed that the Board had "merely enforce[d] a statutory right which Congress considered necessary to allow labor and management to get along with the process of reaching fair terms and conditions of employment—'to provide a means by which agreement may be reached.'" Id., at 429. It further observed, relying on its decision in *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270 (1956), reh. den. 351 U.S. (1956), that it might be necessary to construe language of a collective-bargaining agreement in an unfair labor practice context, and that the Board had the power to do so. If the Board had no such power, it noted, particularly in circumstances where arbitration was unavailable, it would be inconsistent with the legislative scheme, since it would place obstacles in the way of the Board's effective enforcement of an employer's statutory duties. In other words, if the Board couldn't look to the meaning of the contract, that would first force the union into the court system to obtain a ruling on the contract dispute, and thereafter require the union to seek statutory vindication before the Board. Clearly, it said, that was not Congress's intention. A two-step process such as that was held to be contrary to Congress's purpose of rapid, efficient resolution of labor disputes.

The Court then turned to a question not reached by the appellate court's decision—whether the Board was incorrect in determining that the employer had no unilateral right to make the change it did. It observed that the Board had "relied upon its experience with labor relations and the Act's clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board's approach. For the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context. [Citation to law review article omitted.] *Nor can we say that the Board was wrong in holding that the union had not forgone its statutory right to bargain about the pay plan inaugurated by the respondent*." (Emphasis added.) *C & C Plywood Corp*., supra at 430–431.

The Court's reference to 'foregoing a statutory right' is a specific reference to what is generally referred to as 'a clear and unequivocal waiver.' Justice Stewart and the rest of the Court well knew that the statutory rights accorded a union under the Act trump ambiguous language found in a collective-bargaining contract, and require further bargaining to clarify the parties' mutual intent—particularly where arbitration is unavailable.

Indeed, in the underlying case (*C & C Plywood*, 148 NLRB 414 at 416), the Board had specifically utilized the "clear and unmistakable waiver" analysis approved by the Court. It relied directly on its 1961 decision in *Proctor Mfg. Corp.*, 131 NLRB 1166 at 1169 (1961), as well as the Sixth Circuit's decision in

Timken Roller Bearing v. NLRB, 325 F.2d 746 (1963), cert. den. 376 U.S. 971 (1964). Those cases, in turn, can be traced to *Tide Water Oil*, supra, in 1949. Based on that history, I fail to understand why the 'contract coverage' theory of defense has gained any traction whatsoever. In my view, the theory is valueless as a legal rationale. It has not been a viable theory since the Court decided *C & C Plywood* in 1964.

Thus, Supreme Court and Board precedent remain firmly on the side of the clear and unmistakable waiver standard.[9]

Moreover, the contract coverage approach sets traps for the unwary. Such a doctrine only encourages arguing that the bare mention of a topic in a collective-bargaining contract would mean the parties have had a chance to bargain over every aspect of that subject, and thus the contract is determinative.[10] However, this approach only leads to greater labor strife and would grind the collective-bargaining process to a halt.[11] Unions would become perpetually wary of any particular language in an agreement, and would be forced to deal with the sharp practice of an employer using a minor detail to declare a subject 'bargained over.' This would transform bargaining into a game of "gotcha," and provide employers an incentive to skim over the details of as many collective-bargaining agreement clauses as possible because they would have the unfettered right to implement changes as they saw fit. Such situations would lead to a greater number of contract disputes flooding the court system. This is clearly not where Congress instructed labor and management to go.

Under the clear and unmistakable waiver standard, the focus of the parties is sufficiently narrowed so that they do not have to consider every potential iteration of an issue that may or may not appear down the road. They can focus on the issues that are at stake, and if a clear and unmistakable waiver does occur, "the employer's right to take future unilateral action should be apparent to all concerned."[12]

Thus, contract language should not be allowed to trump the statutory rights involved, as connected to the obligation to bargain in good faith, unless the contract language or other evidence amounts to a clear and unequivocal waiver. Here, the question is whether the Union waived its right to bargain over the pension plan. Much as the Court perceived the Board's role in *C & C Plywood Corp.*, in rejecting contract coverage as a defense, I am simply enforcing the statutory duty to bargain in good faith.

3. Past practice

Respondent next contends that its past practice, coupled with the Union's acquiescence to those past practices, afforded Respondent the right unilaterally to change the pension plan. The Supreme Court has long held that a unilateral change made pursuant to a longstanding practice is basically a continuation of the status quo and not a breach of the bargaining obligation.[13]

In *Courier Journal I*,[14] the Board found that the respondent had an established past practice of increasing employees' contributions for health insurance premiums for all employees. The Company had made such increases, without formal notice, in 1992, 1993, 1994, 1999, 2000, and 2001, and the Union had acquiesced each time.[15] The Board held that a subsequent change in 2002 was implemented pursuant to this well-established past practice.[16]

In the instant case, Respondent pointed to a multitude of changes they have made over the last 10 years. The difficulty with this evidence is that, taken as a whole, it is a transparent attempt to flood the record with irrelevant documents. Respondent did introduce documents evidencing changes in the pension plan, but many of these changes appear to be legislative or regulatory mandated changes. One such example would be the first amendment, which was pursuant to the government-mandated Economic Growth Tax Relief Reconciliation Act of 2001. As this is a government requirement, the Union had no authority to challenge the amendment. Despite that, Respondent cites this government mandate as an example of union acquiescence. I am unpersuaded. Moreover, most of its other changes deal with minor administrative changes having no impact on the plan beneficiaries. These cannot amount to evidence of acquiescence, either.

Similarly, Respondent points to changes in other benefits, including vision and dental insurance, life insurance, and other medical insurance, as proof of acquiescence. These have no bearing on the pension plan and I reject them as being irrelevant to the pension plan issue presented here.

Both parties can, however, agree to one significant change prior to their current conflict. In 2005, Respondent froze access to the pension plan for all employees under 50 years old, and employees who were over 50 but not yet vested in the plan. As set forth above, those individuals had four options for how to take their money, one of which was the Company-sponsored 401(k) plan. The Union did acquiesce in this instance and readily admits to it.

Even so, one instance of acquiescence does not amount to a waiver in futuro. It is only a single event or transaction, not the stuff of a past practice. Furthermore, even with this single circumstance, "[a] union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time."[17] This has been a Board standard for over 40 years, and applies even when such further changes arguably are similar to those in which the union may have acquiesced in the past.[18] The 2005 incident has not established a past practice proving any sort of waiver of the right to bargain.

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[9] See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693; *Provena Hospitals*, 350 NLRB 808.

[10] *Provena Hospitals*, 350 NLRB at 818. (Battista, C. dissenting) (stating that it is only necessary that provisions be no more than "relevant to the dispute").

[11] Id. at 813.

[12] Id.

[13] *NLRB v. Katz*, 369 U.S. 736, 746 (1962).

[14] 342 NLRB 1093 (2004).

[15] Id. at 1094.

[16] Id.

[17] *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 (1987).

[18] *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969).

4. Incorporation of the pension plan document

Respondent finally contends the Pension Plan document reserved the right for Respondent to modify the Pension Plan at its discretion. As an abstract matter, an outside document, such as the pension plan document at issue, can be incorporated into a collective-bargaining agreement. If the parties have agreed to incorporate such a document, its terms can be considered bargained for, as much as anything in the collective-bargaining agreement itself.

In *Mary Thompson Hospital*, 296 NLRB 1245, 1246 (1989), the collective-bargaining agreement included a section specifically stating that the pension benefits plan was incorporated into the collective-bargaining agreement. That plan included a clause reserving to the Employer the right to terminate the plan. Likewise, the pension plan here includes a clause allowing for substantive amendments. Respondent argues, therefore, that *Mary Thompson Hospital* should control. However, the case is clearly distinguishable. In *Mary Thompson Hospital* the collective-bargaining agreement explicitly incorporated the pension plan document itself. That is not true here. Respondent's collective-bargaining contract with the Union only states that participants must meet the plan's requirements for participation. That is hardly the language of incorporation by reference, for there must be an express intent to incorporate an outside document, such as the pension plan, for the doctrine to be applicable.

It has also been held that, where a collective-bargaining contract explicitly refers to a benefit plan, such a reference amounts to an incorporation of the terms of that plan. See, e.g., *B.P. Amoco Corp. v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000). In that case, though, the language in the collective-bargaining agreement was far more detailed than what has been presented here. Indeed, the court quoted the operative language, observing:

> The two Texas City, Texas agreements recite that specified "Employee Benefit Plans," including the "Amoco Medical Plan," "are generally set forth in the current Benefits Plan Booklet[s]," although "it is understood that certain provisions in the Booklet have been superseded by negotiation between the parties." [Transcript reference and footnote omitted.] The Wood River, Illinois, and Yorktown, Virginia facilities' agreements provide: "Benefit plans for the Company . . . will continue in force during the life of this Agreement with the understanding that these Plans may be bargained upon but will not be subject to arbitration." [Transcript reference and footnote omitted.] *In each case, the quoted language explicitly makes the plans a part of the collective bargaining agreement*, subject to specific, negotiated variations. (Emphasis added.) Id. at 873–874.

Here, unlike *B.P. Amoco,* there is no mention of the outside plan document in the collective-bargaining agreement. Therefore, with no express reference to the plan document, it cannot be said that Respondent's pension plan has been incorporated by reference into the collective-bargaining contract. Accordingly, Respondent's incorporation by reference argument fails.

B. 401(k) Plan

Respondent admits to materially amending the 401(k) plan when it ceased its matching contributions for plan participants. Respondent contends it had the right to make unilateral changes for reasons similar to those invoked with regard to the pension plan. Respondent grounds its assertions in the second paragraph of article 28 of the contract, which states:

> The Company agrees that if the Omaha World-Herald Newspaper Board of Directors approves the implementation of a 401(k) Plan for its employees, pressroom employees will be eligible to participate in such a plan the same as all other employees based on the provisions of the plan adopted.

This section of the article contains significantly less supporting language than that featured in the preceding paragraph concerning the pension plan. Once again, there is insufficient support to find a waiver by the Union, either through the implicit language or purported past practice.

Aside from the language, the only difference between the freezing of the pension plan accruals and the cessation of the matching contribution to the 401(k) plan was that the former occurred during the course of the contract (though it was open for negotiations), while the latter occurred after the contract had been terminated and bargaining was in progress.

An employer violates its duty to bargain if, while negotiations are in progress, it unilaterally institutes changes in existing terms and conditions of employment.[19] Unilateral action by an employer that modifies mandatory topics of bargaining is a per se violation of Section 8(a)(5).[20] When such unilateralism occurs during bargaining, it is generally proof that the employer has not bargained in good faith.[21]

The exception to this rule is if impasse has been reached in negotiations. If impasse is reached after good-faith negotiations, "an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his preimpasse proposals."[22] The existence of an impasse is a question of fact, and occurs after good-faith negotiations have exhausted the prospects of concluding an agreement.[23] Furthermore, if impasse is reached, the impasse can end suddenly with any changed condition or circumstance that renews the possibility of fruitful discussion.[24]

There is no issue of impasse in the current dispute. In *Taft Broadcasting Co*., the Board evaluated a bargaining dispute involving at least 23 separate bargaining sessions and multiple general mediations. Here, the parties conducted only one bargaining session. This single session, which took place on December 22, involved the initial exchange of proposals and noth-

[19] *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

[20] See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991); *Beverly Health & Rehab Services, Inc.,* 317 F.3d 316 (D.C. Cir. 2003), reh. en banc den. 2003 U.S. App. Lexis 6287.

[21] See *Visiting Nurse Services v. NLRB*, 177 F. 3d 52 (1st Cir. 1999), cert. denied 528 U.S. 1074 (2000); *NLRB v. Unbelievable, Inc.,* 71 F.3d 1434 (9th Cir. 1995).

[22] *Taft Broadcasting Co.*, 163 NLRB at 478.

[23] Id.

[24] *Airflow Research & Mfg. Corp.*, 320 NLRB 861 (1996); *Circuit-Wise, Inc.*, 309 NLRB 905 (1992).

ing more. Before the two parties could meet again, Respondent unilaterally ceased its contribution to the 401(k) plan, in violation of the Act, hardly the stuff of impasse.

IV. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist, and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, it will be ordered to cease bargaining in bad faith with the Union by making unilateral changes in the wages and terms and conditions of employment, specifically the pension and 401(k) benefits.

The affirmative action will include an order making employees whole for any loss to their pension plan and 401(k) accounts, together with interest. Interest shall be calculated in the manner set forth in *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979). Finally, it will be ordered to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

Based upon the foregoing findings of fact, legal analysis, and the record as a whole, I hereby make the following

CONCLUSIONS OF LAW

1. Respondent, Omaha World-Herald, is an employer engaged in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters District Council 2, Local 543M, affiliated with International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. The following is an appropriate bargaining unit:

> All regular full-time and regular part-time journeyman pressmen and apprentice pressman, including leadmen, employed by the Employer at its facility in Omaha, Nebraska, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

4. On December 31, 2008, Respondent violated Section 8(a)(5) and (1) when, without bargaining with the Union despite the Union's request that it do so, it froze the accrual of benefits to those bargaining unit employees who were participating in the pension plan.

5. On April 1, 2009, Respondent violated Section 8(a)(5) and (1) when, without bargaining with the Union, it ceased making its matching contribution to employee accounts.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

Respondent, Omaha World-Herald, Omaha, Nebraska, its officers, agents, and representatives, shall

1. Cease and desist from

a. Unilaterally, without first bargaining with the Union, freezing the accrued pension benefit of all participating employees.

b. Unilaterally, without first bargaining with the Union, suspending its matching contributions to the 401(k) plan.

c. In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Bargain collectively in good faith with the Union concerning the pension plan and the 401(k) plan for those employees the following appropriate bargaining unit:

> All regular full-time and regular part-time journeyman pressmen and apprentice pressman, including leadmen, employed by the Employer at its facility in Omaha, Nebraska, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

b. Upon written request by the Union, and in the manner set forth in the remedy section, reinstate the pension plan as it existed on December 30, 2008.

c. Upon written request by the Union, and in the manner set forth in the remedy section, reinstate the 401(k) plan as it existed on March 31, 2009.

d. Within 14 days of the Board's decision, make whole the employees in the bargaining unit, together with interest, for any benefits they may have lost due to the unlawful unilateral changes, as set forth in the remedy section of this decision.

e. Within 14 days after service by the Region, post at its operation in Omaha, Nebraska copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 17 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 31, 2008.

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[25] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[26] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change the terms and conditions of employment of our bargaining unit employees without first bargaining with Teamsters District Council 2, Local 543M, affiliated with International Brotherhood of Teamsters. More specifically,

WE WILL NOT unilaterally freeze the accrued pension benefits of the bargaining unit employees who were participating in the pension plan on December 31, 2008.

WE WILL NOT unilaterally suspend our matching contributions to the 401(k) plan with respect to bargaining unit employees who held 401(k) accounts on March 31, 2009.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you as set forth above.

WE WILL rescind the changes we made to the pension plan and the 401(k) plan on January 1, 2009, and April 1, 2009, respectively, and WE WILL make whole the affected employees for losses, including interest, which are connected to the decisions we made without first bargaining with Teamsters District Council 2, Local 543M, affiliated with International Brotherhood of Teamsters.

WE WILL bargain in good faith with Teamsters District Council 2, Local 543M, affiliated with International Brotherhood of Teamsters before any changes to the pension plan or the 401(k) plan are made insofar as they have an impact on bargaining unit employees.

The bargaining unit is:

All regular full-time and regular part-time journeyman pressmen and apprentice pressman, including leadmen, employed by us at our facility in Omaha, Nebraska, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

OMAHA WORLD-HERALD